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In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT CONROY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 589 F. 2d 1258.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 23, 1979. A petition for rehearing was denied on April 12, 1979 (Pet. App. C). The petition for a writ of certiorari was filed on May 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Coast Guard exceeded its statutory authority when it stopped and searched petitioners' vessel

after the vessel had fled from the high seas into the territorial waters of Haiti.

2. Whether the warrantless installation of a beeper on petitioners' vessel by an informant who was a crew member violated the Fourth Amendment.

STATEMENT

An indictment filed in the United States District Court for the Southern District of Florida charged petitioners with conspiracy and attempt to import marihuana into the United States, in violation of 21 U.S.C. 963. Following a jury trial, petitioners were convicted on both counts. Petitioner Schubert was sentenced to imprisonment for five years, to be followed by a five-year special parole term. Petitioner Conroy was sentenced to imprisonment for 54 months and 54 months' special parole. Petitioner Dahl was sentenced to imprisonment for 30 months and a three-year special parole term. Petitioner Jacobs was sentenced pursuant to the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010(b). In addition, Schubert and Conroy were fined $15,000 and $5,000 respectively. The court of appeals affirmed (Pet. App. A; 589 F. 2d 1258).

The pertinent evidence, which is not in dispute, is set forth in the opinion of the court of appeals (Pet. App. A-14 to A-16). In December 1975 and the following months a government informant, Fleming Budal, had conversations with petitioners Schubert and Conroy in which plans were made to smuggle marihuana into the United States from Jamaica. Budal reported his conversations to agents of the Drug Enforcement Administration, who furnished him with two electronic tracking devices commonly known as "beepers." The agents directed Budal to conceal the beepers on the smuggling vessel, to activate

the first in order for the agents to be kept aware of its location, and to activate the second when contraband was aboard the vessel.

Schubert subsequently obtained the 58-foot sailboat NAHOA. On September 3, 1976, petitioners Schubert, Dahl and Jacobs, together with Budal, set sail for Jamaica. Budal concealed the beepers on the vessel. When the NAHOA reached a point approximately 40 miles from Jamaica, it took on a cargo of marihuana and prepared to return to the United States.

On September 21, 1976, a DEA airplane received a signal from one of Budal's beepers and passed this information along to the Coast Guard cutter DAUNTLESS, which was awaiting the approach of the NAHOA in the Windward Passage between Haiti and Cuba. The next day the master of the DAUNTLESS, Lieutenant Robert Council, sighted the NAHOA about nine miles southwest of Haiti and signalled it to heave to. Instead of heeding the directions from the DAUNTLESS, petitioners fled into Haitian waters.

Council received permission from the government of Haiti to enter its waters, and the DAUNTLESS pursued and caught the NAHOA. Council and others in a boarding party pulled alongside the NAHOA in a small boat and detected the odor of marihuana. Petitioner Schubert denied Council's request for permission to board the NAHOA. Nevertheless, Council boarded the NAHOA and requested the ship's papers. Council then attempted to enter the main cabin but was obstructed by Schubert. Council ordered Schubert arrested; a subsequent search of the NAHOA uncovered 7,000 pounds of marihuana.

ARGUMENT

1. Petitioners contend (Pet. 7-16) that the seizure and search of the NAHOA in Haitian waters was in excess of the Coast Guard's statutory authority.[1] Apart from their challenge to the use of the beepers (discussed at pages 6-7, *infra*), they do not contend that the search and seizure violated the Fourth Amendment.

The court of appeals correctly rejected petitioners' contention. 14 U.S.C. 89(a) provides in pertinent part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States.

Although the statute does not expressly authorize the Coast Guard to search and seize vessels in foreign territorial waters, its legislative history shows that it was intended to remove any limitations on the Coast Guard's authority that might be urged as a basis for challenging the legality of particular searches and seizures.

Thus, as the court of appeals noted (Pet. App. A-22 to A-23), Section 89 was enacted in response to the decision in *Maul* v. *United States*, 274 U.S. 501 (1927), in which this Court upheld the forfeiture of a vessel seized on the high seas after closely analyzing the provisions of the pertinent statutes. Justice Brandeis, whom Justice Holmes joined, concurred on the ground that the Coast Guard has implied authority to seize American vessels "no matter what the place of seizure and no matter what the law

[1]Although they do not expressly say so, they presumably contend that the evidence seized should therefore be suppressed.

violated" (274 U.S. at 531); that such authority is "implied as an incident of the police duties of ocean patrol which Congress has imposed upon the Coast Guard" (*id.* at 512); and that no express statutory authority is needed (*ibid.*). Justice Brandeis expressed concern that the Court's opinion might imply that express statutory authority is needed to seize and search vessels beyond the territorial waters of the United States and that such an implication "may have in other cases far-reaching and regrettable results" (*ibid.*).

The legislative history of 14 U.S.C. 89 indicates that Congress intended in that Section not only to forestall the concerns voiced by Justice Brandeis regarding the possible consequences of the Court's opinion in *Maul*, but also to adopt his views of the proper scope of Coast Guard authority. Thus, the House committee report quoted his concurring opinion at length and cited wtih approval his view that " 'the Coast Guard is authorized to arrest American vessels subject to forfeiture under our law, no matter what the place of seizure and no matter what the law violated.' " H.R. Rep. No. 2452, 74th Cong., 2d Sess. 3-4 (1936). The report also stated that "in the future it is possible that, based upon some expressions in the majority opinion (in *Maul*), the contention will be made that express authority of law is necessary to secure enforcement by the Coast Guard of some laws and also to give jurisdiction to enforce those laws beyond the 12-mile limit." *Id.* at 2-3. The proposed legislation was intended "to prevent those possible 'far-reaching and regrettable results.' " *Id.* at 3. Accordingly, even though Section 89 does not expressly address the authority of the Coast Guard to act within the territorial waters of another nation, the legislative history makes clear that Congress intended that the Section not be construed as any limitation on the Coast Guard's authority beyond the

territorial waters of the United States. Cf. *United States* v. *Wilson*, 420 U.S. 332, 337 (1975).

Furthermore, since Lieutenant Council obtained express permission from the Haitian Government to enter its waters and search the NAHOA (Pet. App. A-15 to A-16), the Coast Guard's actions involved no breach of international law or treaty.[2] We submit that it would be unreasonable to conclude that Congress in 14 U.S.C. 89 intended to prohibit the Coast Guard from performing law enforcement functions in foreign waters when it acts with the consent of the foreign sovereign and in compliance with international law and treaty obligations.[3]

2. Petitioners also assail the warrantless installation of the beeper within their vessel and the monitoring of its signals by law enforcement agents. This attack is without merit. The beeper was installed by a government informant who had been invited by petitioners to be a participant in their wrongdoing, and who, as the court of

[2]The court of appeals also held (Pet. App. A-26 to A-28) that under the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606 (1958), to which both the United States and Haiti are signatories, permission of the Haitian Government would not have been required for this non-hostile incursion. Furthermore, the court observed (Pet. App. A-28) that even if the actions had violated international law and treaty obligations, individuals have no basis for complaint; as this Court stated in *The Richmond*, 13 U.S. (9 Cranch) 102, 103 (1815), "[The] offence * * * must be adjusted between the two governments. This Court can take no cognizance of it." In any event, because the consent of the government of Haiti was in fact obtained in this case, it is unnecessary to reach those questions.

[3]Even if the Coast Guard had acted in excess of its statutory authority, we submit that such an infraction alone would not justify the application of the exclusionary rule in the absence of any separate constitutional violation. Cf. *United States* v. *Caceres*, No. 76-1309 (Apr. 2, 1979), slip op. 12-15.

appeals noted (Pet. App. A-18), had "no legal obligation to conceal his whereabouts." Installation of the beeper thus was not accomplished by means of an unauthorized physical trespass,[4] and no warrant was necessary to legalize the informant's conduct. See *United States* v. *White*, 401 U.S. 745 (1971); *Lopez* v. *United States*, 373 U.S. 427 (1963). See also *Lewis* v. *United States*, 385 U.S. 206 (1966). Just as the defendants in *White* and *Lopez* had no justifiable expectation that their conversations with supposed confederates would not be recorded and transmitted, petitioners here had no expectation protected by the Fourth Amendment that a supposed accomplice on board the vessel would not disclose the vessel's location, electronically or otherwise. Indeed, as the court below noted (Pet. App. A-19 n.8), this case involves a significantly lesser intrusion on privacy interests than the recording and transmitting of conversations.

[4]The fact that there was no trespass here, as the court of appeals noted (Pet. App. A-17), distinguishes this case from *United States* v. *Holmes*, 537 F. 2d 227 (5th Cir. 1976) (en banc; affirming the district court by an equally divided vote), on which petitioners rely (Pet. 17-18).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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